

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-0608**

State of Minnesota,  
Respondent,

vs.

Brandon John Schmidt,  
Appellant.

**Filed May 8, 2023  
Affirmed  
Reilly, Judge**

Stearns County District Court  
File No. 73-CR-20-7791

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,  
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max Brady Kittel, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Larson,  
Judge.

**NONPRECEDENTIAL OPINION**

**REILLY, Judge**

On appeal from his conviction for third-degree criminal sexual conduct, appellant argues the district court abused its discretion in denying his motion for a downward dispositional departure from the presumptive prison sentence. Because the district court

carefully evaluated the reasons for and against departure when concluding that appellant was not particularly amenable to individualized treatment in a probationary setting, we affirm.

## **FACTS**

In November 2020, appellant Brandon John Schmidt was living with his former girlfriend, K.W., in their shared residence after they recently ended their relationship. One evening, Schmidt groped K.W. and she ordered him to stop. Schmidt repeatedly left the residence to drink alcohol in his vehicle and then return inside, appearing more and more intoxicated each time. K.W. told Schmidt she did not want to sleep beside him and asked if he wanted to sleep on the bed or the couch. After Schmidt did not respond, K.W. chose to sleep in the bedroom and shut the door. Schmidt entered the bedroom a short time later. He laid down next to K.W. and grabbed her stomach, breasts, and genital area over her clothes. K.W. told Schmidt to stop and that their relationship was over, pushing him away. Schmidt left the bedroom and K.W. fell asleep.

During the night, K.W. was awoken by Schmidt lying next to her wearing only his boxers and holding her in a position where she could not move. Schmidt told K.W. that he loved her. K.W. told Schmidt to stop. Schmidt forced his hand down K.W.'s pants and digitally penetrated her. K.W. again told him to stop and tried to grab his hand. But Schmidt did not stop until he eventually passed out. In the morning K.W. called the police. She informed police she was afraid of Schmidt but did not want to get him in trouble. Schmidt told the officers he did not remember what happened and said it was possible he groped K.W. but stopped when she told him to stop.

Respondent State of Minnesota charged Schmidt with third-degree criminal sexual conduct. After his first appearance, the district court released Schmidt from custody with conditions requiring him to abstain from drugs and alcohol, report to a probation agent, follow the recommendations of his chemical use assessment, and have no contact with K.W. The district court issued a no-contact order (NCO).

In January 2021, Schmidt entered a *Norgaard* guilty plea.<sup>1</sup> In exchange for the plea, the state agreed not to charge NCO violations for calls Schmidt made to K.W. The parties agreed Schmidt would complete a chemical-dependency evaluation. The state also agreed to release Schmidt from custody directly to an inpatient chemical-dependency treatment facility if a bed became available. Last, the parties agreed that if Schmidt violated the terms of his release conditions, left treatment, contacted K.W., obtained new criminal charges, or failed to appear for sentencing, he would have violated the plea agreement and would be returned to jail immediately.

The state released Schmidt from custody to attend residential treatment at Twin Town Treatment Center (Twin Town). Schmidt completed the program and Twin Town recommended he continue treatment at Restoration Counseling & Community Services (RCCS). The district court modified Schmidt's release order to allow him to attend RCCS and follow the recommendations of his chemical-dependency evaluation. On April 9,

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<sup>1</sup> A *Norgaard* plea is a guilty plea in which a defendant "plead[s] guilty even though he . . . claims a loss of memory . . . regarding the circumstances of the offense." *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Schmidt violated his release conditions when he left RCCS treatment without staff approval, failed to contact his probation agent, and failed to report to jail.

K.W. filed a request for the NCO to be lifted and asked for Schmidt's charge to be stayed or dismissed after he obtained one year of sobriety. K.W. stated, "I do not feel grabbing me in bed was sexual assault as we did live together and our relationship was on again off again, he needed treatment, help." The district court denied the request based on Schmidt's recent violation of the release conditions and issued a warrant for his arrest.

On April 13, Schmidt enrolled himself in NuWay intensive outpatient treatment. Schmidt was apprehended on the warrant and the district court held a hearing on his release condition violations. The district court allowed Schmidt out of custody to continue treatment at NuWay "on a short leash." A short time later, the state learned that, while Schmidt was in custody before the hearing, he made two phone calls to K.W. in violation of the NCO and his release conditions. When the district court learned of this violation, it issued another arrest warrant for Schmidt. Police apprehended Schmidt at K.W.'s residence, constituting another violation. After a hearing on these violations, the district court again released Schmidt to continue treatment.

Schmidt tested positive for alcohol on June 21. The district court ordered Schmidt to be held in custody. In July, Schmidt made several calls to K.W. from jail. The state charged Schmidt with six NCO violations in a separate criminal case.

In February 2022, the district court held a sentencing hearing. The district court considered arguments from both parties, a statement from K.W., and Schmidt's presentence investigation report (PSI). Schmidt moved for a downward dispositional

departure from the presumptive prison sentence to attend a dual-diagnosis treatment program for mental health and chemical dependency. Schmidt argued his untreated mental-health concerns, stemming from the death of his son in 2017 and his divorce, contributed to his alcohol abuse. K.W. read an impact statement, indicating that the state “grossly exaggerated” Schmidt’s conduct and requested that he receive treatment rather than jail time. The district court determined there were not substantial and compelling reasons to depart from the presumptive sentence and sentenced Schmidt to 48 months in prison.

This appeal follows.

## **DECISION**

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses and seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing.” Minn. Stat. § 244.09, subd. 5 (2022). A district court may depart from the presumptive guidelines sentence only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2020); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “[D]epartures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). We review a district court’s decision on a sentencing departure motion for an abuse of discretion. *Id.*

A downward dispositional departure may be based on a defendant’s “particular amenability to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *see also* Minn. Sent’g Guidelines 2.D.3.a.(7) (2020). But

“merely being amenable to probation” is insufficient; “requiring a defendant to be particularly amenable to probation . . . distinguishes the defendant from most others and . . . presents the substantial and compelling circumstances that are necessary to justify a departure.” *State v. Soto*, 855 N.W.2d 303, 308-09 (Minn. 2014). Factors that may show a defendant’s “particular amenability” to probation include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Trog*, 323 N.W.2d at 31.

But even if a district court finds the existence of one or more factors, the district court need not depart. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013), *rev. denied* (Minn. Feb. 18, 2014). This court affirms “the imposition of a presumptive guidelines sentence when the record shows [that] the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013). A district court’s refusal to depart from the guidelines will be reversed only in “rare” cases. *Kindem*, 313 N.W.2d at 7.

Schmidt contends that he is particularly amenable to individualized treatment in a dual-diagnosis program to simultaneously treat his mental-health and chemical-dependency issues because his alcohol abuse relates to underlying mental-health challenges. At sentencing, Schmidt asserted that Twin Town, RCCS, and NuWay were not dual-diagnosis programs and lacked the individualized mental-health treatment Schmidt requires. The district court acknowledged that Schmidt’s PSI conveyed that he had been diagnosed with PTSD, depression, and anxiety. The district court noted Schmidt

was aware of his underlying mental-health issues when he was in chemical-dependency treatment and questioned why Schmidt failed to seek mental-health treatment. Schmidt told the PSI evaluator that he was not seeing a therapist, although one was recommended, because he “[had not] felt like [he] wanted to go.” The district court asked Schmidt what he had done since the PSI to address his mental health. Schmidt stated that he had been “talking to therapists” over the past year but only once per month to obtain and adjust his medications. We discern no abuse of discretion when the district court declined to find that these facts “set [Schmidt] apart” and showed that Schmidt is “particularly amenable” to treatment when he was unmotivated to seek necessary mental-health treatment until the time he was sentenced. *Soto*, 855 N.W.2d at 311.

Schmidt also argues his successful treatment for alcohol abuse at Twin Town proves his particular amenability to treatment at a dual-diagnosis program because he thrived in Twin Town’s extremely structured program. Though he may have succeeded in his first treatment setting, the record shows Schmidt struggled to complete and adhere to the conditions of subsequent treatment programs. Schmidt absconded from treatment at RCCS without permission from staff, his probation agent, or the district court. While being treated by a third program, NuWay, Schmidt failed to maintain his sobriety and drank alcohol in violation of his release conditions. At sentencing, the district court considered Schmidt’s behavior and noted he “left [treatment] but didn’t come back to jail, [he] just went out on [his] own and did whatever [he] decided to do.” Schmidt argues RCCS and NuWay’s programs were not as structured as Twin Town and “made it difficult for him to comply with treatment and his conditions of release.” But Schmidt fails to acknowledge that he

chose to enroll in NuWay and only participated in treatment programming via Zoom. We agree with the district court that these are not “substantial and compelling circumstances” that justify a departure. *Id.* at 309.

Finally, Schmidt argues his remorse, age, criminal record, family support, and motivation are factors that indicate he is particularly amenable to individualized treatment in a probationary setting. In his PSI and at sentencing, Schmidt stated that he felt “sorry, remorse, guilt” for the offense and for “disrespecting” the district court. But Schmidt also minimized the seriousness of his conduct and explained to the PSI evaluator, “In no way shape or form was I maliciously grabbing her . . . this has all been embellished a bit too much by [the state].” Schmidt further asserts that because this is his first felony offense at age 36, he is a “perfect candidate for a dispositional departure.” And Schmidt contends the support of his mother and half-brother, together with his own motivation to succeed in treatment, are factors that support his departure motion.

While the district court did not make particularized findings on these factors, the record shows the district court “carefully evaluated all the testimony and information presented” in considering the PSI, the arguments of the parties, K.W.’s statement, and letters of support from Schmidt’s family before making its sentencing determination. *Johnson*, 831 N.W.2d at 925; *see also State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985) (stating the district court need not explain its rationale against departure when it imposes a presumptive sentence). The district court acted within its discretion in denying Schmidt’s motion. Schmidt benefitted from opportunities to obtain necessary treatment during this case. And he also incurred several conditional-release violations when he



absconded from his second treatment center, contacted K.W. repeatedly via phone from jail, stayed in her residence despite the district court's NCO and repeated warnings, and failed to maintain his sobriety. The district court reasoned that Schmidt's repeated conditional-release violations did not establish he was amenable to probation.

This is not a "rare" case justifying reversal of the district court's decision not to depart from the presumptive sentence. *Kindem*, 313 N.W.2d at 7. On this record, the district court did not abuse its discretion when it determined Schmidt failed to establish substantial and compelling circumstances in favor of a downward departure and imposed the presumptive 48-month prison sentence.

**Affirmed.**